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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1925

No. 163

THE VIRGINIAN RAILWAY COMPANY, *Petitioner*

vs.

A. J. MULLENS, *Respondent*

UPON A WRIT OF CERTIORARI TO THE CIRCUIT COURT OF WYOMING COUNTY, STATE OF WEST VIRGINIA

BRIEF OF COUNSEL FOR PETITIONER

ROANOKE PRINTING CO., INC., ROANOKE, VA.

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STATEMENT OF GROUNDS OF JURISDICTION

This is a writ of certiorari to review a judgment of the Circuit Court of Wyoming County entered on the 1st day of December, 1923 (R. 9).

A petition for a writ of error to said judgment was presented to the Supreme Court of Appeals of West Virginia, the highest court in said State, and the writ of error applied for was refused by order dated the

21st day of March, 1924 (R. 1). Subsequently, petitioner presented a petition for a writ of error to said Court, but the said petition was again refused on the 27th day of June, 1924, and the Court entered an order refusing a writ of error and supersedeas to said judgment (R. 1). No opinion was delivered by said Supreme Court of Appeals of West Virginia.

On the 14th day of June, 1921, respondent instituted an action against the petitioner in the Circuit Court of Wyoming County, West Virginia. In his declaration it is alleged that Petitioner in and about the year 1904, had constructed an embankment for its roadbed along Slab Fork Creek in said county and had cast into the said creek stones and dirt thereby filling up the channel of said creek, diverting the waters of the creek upon the adjacent lands of the respondent, and that on numerous occasions from the date of said diversion to the time of the institution of the suit, and particularly on the 15th day of July, 1919, by reason of the alleged wrongful filling up of the channel of said stream, the waters of said stream were diverted from the natural channel and thereby caused to wash away the soil, trees, etc., of the respondent's land, thereby causing him great damage (R. 4 and 5).

Petitioner demurred to said declaration upon the ground that it showed that the cause of action arose in July, 1919, at which time petitioner's railroad was under the control and in the possession of the United States Government (R. 7).

The Court overruled said demurrer (R. 9).

Petitioner thereupon filed its plea of the general issue and its plea of the statute of limitations (R. 6 & 7).

Upon the trial of the case it appeared that at the time that the floods which damaged respondent's land occurred, petitioner's railroad was in actual possession of and being operated by the United States Government, and that petitioner was wholly without any control over its said railroad (R. 16 & 18).

It further appeared that the fill which it is claimed caused respondent's damages was constructed by the Deepwater Railway Company, the petitioner's predecessor in title (R. 67 & 68). Petitioner requested the court to instruct the jury that there was no liability upon petitioner for damage caused by floods occurring between December 28, 1917, and March 1, 1920, but the court refused to give said instruction and respondent duly excepted (see defendant's instruction No. 4, R. 84).

The court over petitioner's objection and upon motion of respondent instructed the jury that if the obstructions were placed in the stream as alleged in the declaration and were not in any way due to or caused by the operation of the petitioner's railroad by the United States Railroad Administration, then the fact that the said railroad was operated and controlled by said Railroad Administration at the time the damages or any of them occurred, constitutes no defense to the action (Plaintiff's instruction No. 6, R. 83). A motion for a trial was made and overruled (R. 9).

The action of the court in overruling the demurrer, in refusing to give instruction No. 4 for petitioner and giving instruction No. 6 for respondent, and in overruling the motion for a new trial, were the subjects of assignments of error in the petition for a writ of error to the West Virginia Supreme Court (R. 2).

The claim made by the petitioner in the court be-

low was that being guilty of neither creating nor maintaining the alleged nuisance, no liability exists against petitioner for damage occasioned thereby, and that petitioner's railroad being then under the exclusive control of the United States Railroad Administration, the liability, if any, for maintenance of the alleged nuisance was upon the United States and not upon the petitioner.

STATUTES RELIED UPON

Act of August 29, 1916, c. 418, 39 Stat. L. 619, 645; Act of March 21, 1918, c. 25, 40 Stat. L. 451.

Proclamation of the President December 26, 1917, 40 Stat. L., 1733.

Act February 28, 1920, c. 91 Sec. 200, 41 Stat. L. 457.

Judicial Code 237 as amended Act December 23, 1914, c 2; Act September 6, 1916, c 448, Sec. 2; Act February 17, 1922, c 54 (36 Stat. L., 1156, 38 Stat. L. 790, 39 Stat. L., 726, 42 Stat. L. 366).

West Virginia Code c 135, Sec. 1, 9, 11, 12.

CASES RELIED UPON TO SUSTAIN JURISDICTION

Supreme Lodge K. P. vs. Meyer, 265 U. S. 30;

Y. & M. V. RR. Co. v. Clarksdale, 257 U. S. 10;

American Ry. Express Co. vs. Levee, 263 U. S. 19;

Andrews vs. Virginian Ry. Co. 248 U. S. 272.

STATEMENT OF THE CASE

The Respondent by two certain deeds dated respectively in the years 1902 and 1904 conveyed to Deepwater Railway Company two strips of land situated in Wyoming County, West Virginia, for railroad right of way (R. 27, 77, 78 and 79). Prior to the year 1906 the said Deepwater Railway Company constructed its roadbed upon said strip of land and shortly thereafter commenced the operation of a railroad thereover. The said railroad was constructed according to the most approved engineering methods, and in the construction of the railroad it was necessary to encroach to some extent upon the waters of the Slab Fork Creek (R. 66, 68 and 71).

By deed dated the 22nd of April, 1907, the Deepwater Railway Company, a West Virginia corporation, conveyed said strips of land, together with the railroad thereon, to your petitioner, a Virginia corporation (R. 68 and 71). From the date of the last mentioned deed until the beginning of the federal control on December 26, 1917, the said railroad was operated by your petitioner and the cuts and fills remained in practically the same condition from the time of the construction of the railroad by the Deepwater Railway Company until after the beginning of Federal control (R. 69).

Resppondent made no claim and gave no notice whatsoever to petitioner that the railroad embankment constructed upon said strips of land diverted the waters of the stream and caused them to flow over and upon respondent's adjacent land or in any manner constituted a nuisance (R. 24, 68).

Prior to February, 1918, no appreciable damage

was done to respondent's land. In February, 1918, a flood occurred which did considerable damage to respondent's land, and in July, 1919, another flood occurred which did still greater damage to respondent's land. It is only on these two occasions that any appreciable damage was done to respondent's land (R. 15). At the time of these two floods the Federal Government was in actual physical possession of the Virginian Railroad, and the petitioner was entirely excluded from any participation in the maintenance of the roadbed (R. 16, 30, 54 and 71).

The alleged nuisance was created by the Deepwater Railway Company when the railroad was originally constructed. At the time the alleged damages occurred, the alleged nuisance was being maintained by the United States Government. Your petitioner not being the creator of the alleged nuisance, and not being guilty of maintaining the alleged nuisance at the time the damages sought to be recovered in this action were sustained denied liability for the alleged damages. The jury returned a verdict against petitioner for the sum of $8,000.00 and the court entered judgment against petitioner for that amount. The precise question involved is whether or not your petitioner, being guilty of neither creating nor maintaining after notice to abate the alleged nuisance, can be held liable for damage caused thereby, at a time when petitioner was deprived by law of the right to abate the nuisance.

ASSIGNMENTS OF ERROR

1. The Court erred in overruling petitioner's demurrer to declaration (R. 7, 9).

2. The Court erred in refusing petitioner's instruction No. 4 (R. 84).

3. The Court erred in giving respondent's instruction No. 6 (R. 83).

4. The Court erred in overruling petitioner's motion for new trial (R. 9).

SUMMARY

The Supreme Court of Appeals of West Virginia having refused an application for writ of error to the judgment of the Circuit Court of Wyoming County, this court should review the said judgment upon writ of certiorari.

> "A party to a controversy in any Circuit Court may obtain from the Supreme Court of Appeals or a Judge thereof, in vacation, an appeal from, or a writ of error or supersedeas to a judgment decree or order of such Circuit Court in the following cases: In civil cases where the matter in controversy, exclusive of cost, is of greater value or amount than $100.00 wherein there is a final judgment or decree or order * * *."
>
> W. Va. Code, c 135, Sec. 1.

> "The petition shall be presented to the Supreme Court of Appeals or to a Judge thereof."
>
> W. Va Code, Chapter 135, Section 9.

> "In a case wherein the Court shall deem the judgment decree or order complained of plainly right and reject it on that ground, no other petition therein shall afterwards be entertained. But the rejection of such petition by a judge in vacation shall not prevent

the presentation of such petition to the Court when in session."

W. Va. Code, c 135, Sec. 11.

"The Court or judge to whom a petition is duly presented, if of opinion that the decision complained of ought to be reviewed, may allow an appeal, writ of error or supersedeas, and may stay proceedings either in whole or in part."

W. Va. Code, c 135, Sec. 12.

The judgment of the Circuit Court of Wyoming County, therefore, only became final upon the 27th day of June, 1924, the date of the last refusal of the writ of error by the Supreme Court of West Virginia.

Am. Ry. Express Co. v. Levee, 263 U. S. 19;
Andrews v. Vgn. Ry. Co. 248 U. S. 272.

The Supreme Court of the United States has jurisdiction to review the decision of the highest court of the State of West Virginia by writ of certiorari.

"It shall be competent for the Supreme Court, by certiorari or otherwise, to require that there be certified to it for review and determination with the same power and authority and with like effect as if brought up by writ of error, any cause wherein a final judgment or decree has been rendered or passed by the highest court of a State in which a decision could be had, where is drawn in question ***; or where any right, title, privilege or immunity is claimed under the Constitution, or any treaty or statute of, or commission held or authority exercised under the United

States, and the decision is either in favor of or against the title, right, or privilege, or immunity especially set up or claimed by either party, under such Constitution, treaty, statute, commission or authority."

36 Stat. L. 1156;
38 Stat. L. 790;
39 Stat. L. 726;
42 Stat. L. 366.

"The President, in time of war, is impowered, through the Secretary of War, to take possession and assume control of any system or systems of transportation, or any part thereof, and to utilize the same, to the exclusion as far as may be necessary of all other traffic thereof, for the transfer or transportation of troops, war material and equipment, or for such other purposes connected with the emergency as may be needful or desirable."

39 Stat. L. 645.

"Now, therefore, I, Woodrow Wilson, President of the United States, under and by virtue of the powers vested in me by the foregoing resolutions and statute, and by virtue of all other powers thereto me enabling, do hereby, through Newton D. Baker, Secretary of War, take possession and assume control at 12 o'clock noon on the 28th day of December, 1917, of each, and every system of transportation and the appurtenances thereto located wholly or in part within the boundaries of the continental United States and consisting of railroads and owned or controlled systems of coastwise and inland transportation engaged in general transportation, whether operated by steam or by electric power, includ-

ing also terminals, terminal companies, and terminal associations, sleeping and parlor cars, private cars and private car lines, elevators, warehouses, telegraph and telephone lines, and all other equipment and appurtenances commonly used upon or operated as a part of such rail or combined rail-and-water systems of transportation; to the end that such systems of transportation be utilized for the transfer and transportation of troops, war material, and equipment, to the exclusion so far as may be necessary of all other traffic thereon; and that so far as such exclusive use be not necessary or desirable such systems of transportation be operated and utilized in the performance of such other services as the national interest may require and of the usual and ordinary business and duties of common carriers.

"It is hereby directed that the possession, control, operation, and utilization of such transportation systems, hereby by me undertaken, shall be exercised by and through William G. McAdoo, who is hereby appointed and designated Director General of Railroads. Said director may perform the duties imposed upon him, so long and to such extent as he shall determine, through the boards of directors, receivers, officers, and employees of said systems of transportation. Until and except so far as said director shall from time to time by general or special orders otherwise provide, the boards of directors, receivers, officers and employees of the various transportation systems shall continue the operation thereof in the usual and ordinary course of the business of common carriers, in the names of their respective companies."

40 Stat. L. 1733.

"Section 10, That carriers while under federal control shall be subject to all laws and liabilities as common carriers, whether arising under state or federal laws, or at common law, except in so far as may be inconsistent with the provisions of this act or any other act applicable to such federal control or with any order of the President."

Act approved March 21, 1918.
40 Stat. L. 451.

"Federal control shall terminate at 12:01 A. M., March 1, 1920, and the President shall then relinquish possession and control of all railroads and systems of transportation then under federal control and cease the use and operation thereof."

Act February 28, 1920, Chap. 91, Sec. 200.
41 Stat. L. 457.

The petitioner claimed immunity under the Federal Control Act and the proclamations of the President and Acts of the Railroad Administration in taking over the petitioner's railroad and the decision was against such immunity. Under such circumstances this Court will review such a decision by certiorari.

Supreme Lodge K. P. v. Meyer, 263 U. S. 30;
Y. & M. V. RR. Co. vs. Clarksdale, 257 U. S. 10.

A railroad company is not liable for the acts of the United States Railroad Administration during Federal control and hence is not liable for the failure of the Railroad Administration to abate a nuisance on property owned by the Railroad Company.

Mo. Pac. R. Co. v. Ault, 256 U. S. 554;
N. C. RR. Co. v. Lee, 260 U. S. 16;

Atl. Coast Line RR. Co. v. Southern Cotton Oil Mills, 129 Va. 323, 106 S. E. 337;
Renno v. Seaboard Air Line RR. Co. 120 S. C. 7, 112 S. E. 439;
Baggott vs. S. Ry. Co. 300 Fed. 337;
L. & N. R. Co. v. Jackson, 270 S. W. 58.

ARGUMENT

The Supreme Court of Appeals of West Virginia having refused an application for a writ of error to the judgment of the Circuit Court fo Wyoming County, this Court should review the judgment of said Circuit Court on writ of certiorari.

The judgment of the Circuit Court of Wyoming County, only became final upon the 27th day of June, 1924, the date of the last refusal of the writ of error by the Supreme Court of West Virginia. The statutes of Virginia and West Virginia upon the subject of granting writs of error are practically the same, and this was the conclusion reached by this Court in Andrews vs. The Virginian Railway Company, 248 U. S. 272.

See also Am. Ry. Ex. Co. vs. Levee 263 U. S. 19.

NO LIABILITY UPON PETITIONER FOR DAMAGES CAUSED BY FLOODS OCCURRING DURING FEDERAL CONTROL.

The diversion of a stream by filling in a natural channel is considered a nuisance, and liability therefor is placed on that ground.

McMechen vs. Hitchman-Glen Dale Co., 88 W. Va. 633, 107 S. E. Rep. 480.

The rule of law is that liability for a nuisance

arises only either from the wrongful act of creating the nuisance or the wrongful act of continuing a nuisance created by others. The mere ownership of property on which there exists a nuisance created by others does not make the owner liable for damages caused by the nuisance. In such cases the owner's liability for damages arises from the failure to abate the nuisance. The purchaser of property on which a nuisauce has been created does not become liable until he has been notified to abate the nuisance.

20 Ruling Case Law, Nuisances, Sections 14, 15 and 16, page 391 and following.

29 Cyclopedia, Law & Procedure, pages 1203 and 1204.

Case note 27 L. R. A. (N. S.), page 164.

Plumer vs. Harper, 14 American Decisions 333. Note page 336.

Baggott vs. So. Ry. Co. 300 Fed. 337.

As hereinbefore stated, the two floods which occurred in February, 1918, and July, 1919, are the only floods which caused any appreciable damages to respondent's lands. Both of these floods occurred during Federal control, and at a time when the Federal Government was in the actual physical possession of the line of the Virginian Railway. At that time the President had taken possession and control of Petitioner's line of railroad on December 28th, 1917, pursuant to the proclamation of December 26th, 1917 (40 Stat. L. 1733, under the act of August 29, 1916, Chap. 418, 39 Stat. L. 619 and 645), and was operating the line of railroad through the Director General under the Federal Control Act (Act March 21, 1918, Chap. 25, 40 Stat. at L. 451). The effect of Federal control was to deprive Petitioner of all control, whatsoever, over its

property, and to transfer the control of the property of Petitioner to the Government. During the period of Federal control, Petitioner could do nothing whatever with respect to the maintenance of its physical properties, and consequently, could not have done anything to have prevented the damages caused by the two floods in question.

The liability for damages occasioned by the two floods occurring during federal control, if it can be sustained at all, must be predicated upon the negligent maintenance of the roadbed, and not upon the original construction of the roadbed. State ex rel Missouri Pacific Railway Co. vs. Allen 267 Southwestern 960.

In Mo. Pac. R. Co. v. Ault, 256 U. S. 554, this Court has considered the effect of Federal control under the various statutes providing therefor, and it was held that under the law there was no liability upon railroad companies upon any cause of action arising out of the operation of their system of transportation by the Government.

Again, in N. C. Railroad Co. vs. Lee, 260 U. S. 16, it was held that the Government operated the railroads not as lessee, but under a right in the nature of eminent domain, and that actions for injuries suffered during Federal control could not be maintained against the railroad company.

It is, therefore, respectfully insisted that this action being an action for the maintenance of a structure, which constituted a nuisance, should have been brought, if at all, against the railroad administration, and that no liability exists upon petitioner for damages arising during Federal Control out of the maintenance of its roadbed.

The question presented here has been before the

State courts in several cases. In Atlantic Coast Line R. R. Co vs. Southern Cotton Oil Mills, 129 Va. 323, 106 S. E. 337, the plaintiff's property was damaged by an insufficient pipe or culvert under the railroad causing the impounding of water on the property of the plaintiff. The pipe had been installed by the railroad company prior to Federal Control, but the damages had been caused both prior to Federal Control and during Federal Control. The Supreme Court of Virginia held that the Director General was liable for damages caused by the maintenance of the faulty construction of this pipe.

In Renno vs. Seaboard Air Line R. R. Co., 120 S. C. 7, 112 S. E. 439, the railroad company had constructed a fill with a culvert through the fill to carry off the water. The Culvert was not sufficient in size to carry off water in times of freshets, and consequently, a pond was formed along the side of the railroad embankment. A small boy playing in the pond was drowned. The Culvert and embankment had been constructed by the railroad company prior to Federal Control. The accident occurred during Federal Control. An action was brought against both the railroad company and the Director General of Railroads. The railroad company demurred to the complaint on the ground that the cause of action was solely against the Director General of Railroads. The demurrer was sustained, and the case against the Director General of Railroads went to trial. There was a motion for a directed verdict on the ground that the cause of action was not based upon any liability of the Director General of Railroads, as a common carrier, and was, therefore, without warrant of law. The Court overruled the motion, holding that the failure of the Director Gen-

eral to abate an attractive nuisance by enlarging the culvert to a proper size, showed a reckless disregard of the rights of children who might resort to the pond for pleasure, and it was, therefore, negligence. The court further held that under Section 10 of the Federal Control Act, the railroad administration was liable for maintenance of this nuisance.

The case of L. & N. R. R. Co. vs. Jackson, 270 S. W. 58, decided by the Supreme Court of Alabama was a case in which the railroad company was sued for not maintaining a station during federal control. The railroad company had contracted to maintain a station at that location. When the Director General of Railroads took charge under federal control the station was torn down and removed and discontinued as a railroad station. After federal control ended, the railroad company failed to rebuild and reestablish the station. The party with whom the contract to maintain the station was made sued for damages for failure to maintain the station both during and after federal control. The court held that the railroad company was liable for such damages as accrued after federal control, but was not liable for damages which accrued during federal control. The case in effect holds that a railroad company is not liable for damages occurring during federal control because during that period the railroad company was without power or authority to exercise any control over its property.

In Baggott vs. Southern Ry. Company, 300 Fed. 337, the complainant alleged that the defendant in 1907 negligently constructed a trestle across a river in such manner that there was not sufficient space for water to pass through the trestle freely in flood periods. The defendant knew that by reason of the changing condi-

tion of the ground the water was liable to rise more rapidly and to a greater height year by year, and the defendant, with full knowledge of this condition, maintained the trestle in the negligent manner above described. During the month of August, 1918, the river rose to a great height and by reason of the faulty construction and maintenance of the trestle plaintiff's land was submerged and his crops damaged. The defendant demurred to the complaint upon the ground, among others, that the cause of action arose during federal control, and consequently, no liability existed against the railroad corporation, and that the suit should be brought against the Director General of Railroads appointed by the President.

The Court sustained the demurrer in an exhaustive opinion which fully discusses the principle applicable to such cases. The conclusion reached is absolutely at variance with the decision of the West Virginia Supreme Court in the case at bar.

It is, therefore, respectfully submitted that the Circuit Court erred in holding that your Petitioner, The Virginian Railway Company, was liable for damages arising out of the maintenance of its roadbed during the period of Federal Control.

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